DuPont Specialty Products USA, LLC, as a successor to E.I. du Pont de Nemours and Company *and* Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of DuPont Workers. Case 05–CA–222622

July 8, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On October 11, 2019, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, DuPont Specialty Products USA, LLC, as a successor to E.I. du Pont de Nemours and Company, Richmond, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Replace paragraph 2(g) with the following:

(g) Post at its facility in Richmond, Virginia, copies of the attached notice marked "Appendix."[5] Copies of the

[1] The Respondent has excepted to the judge's refusal to allow it to introduce expert testimony regarding workplace-safety regulations at the Spruance site, hazards present there, and measures to mitigate. "[T]he Board accords judges significant discretion in controlling the hearing and directing the creation of the record." *Cadillac of Naperville*, 368 NLRB No. 3, slip op. at 1 fn. 1 (2019). Specifically, "[w]hether to permit expert testimony is a question that is committed to the discretion of the trial judge." *California Gas Transport*, 355 NLRB 465, 465 fn. 1 (2010).

We find that the judge did not abuse his discretion by refusing to permit the testimony. The record clearly establishes, and it is undisputed, that there are significant hazards at the Spruance plant. The judge did not err in concluding that the probative value of the expert testimony the Respondent sought to introduce would be marginal because that testimony would be largely cumulative of the testimony of Robert Lukhard, the Respondent's chief of emergency services, who testified about the dangers present at the site. The Respondent's reliance on *Glen Falls Building & Construction Trades Council (Indeck Energy)*, 325 NLRB 1084, 1087 (1998), is misplaced. In that case, the Board found that the judge should have allowed expert testimony to help resolve the difficult question of whether the respondent, which was developing a multimillion dollar steam-and-electricity "cogeneration" facility, was an employer in the construction industry within the meaning of the proviso to Sec. 8(e) of the Act. In finding that the judge erred, the Board explained that "there are only a very limited number of relevant Board decisions and none of them involve the construction of a cogeneration plant or a project of similar magnitude." Id. Here, in contrast, the judge reasonably concluded that expert testimony was unnecessary to help resolve the relatively commonplace issue of whether a subcontracting decision involved a mandatory subject of bargaining.

The Respondent also excepts to the judge's ruling rejecting its request to admit a hazard-analysis document under seal and to seal the hearing room during its admission. The judge left the Respondent free to introduce the document into evidence unsealed. The Respondent declined to do so and instead elicited testimony from Lukhard. Again, we find that the judge did not abuse his discretion. Because it is undisputed (and Lukhard's testimony and other evidence establishes) that there are significant industrial hazards at the plant, the document's probative value would have been slight. And the judge reasonably decided that the document's marginal relevance was outweighed by the administrative burdens associated with a seal.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[3] In affirming the judge's unfair labor practice findings, we do not rely on the judge's reading of *Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R.*, 342 NLRB 458, 469 (2004), enfd. 414 F.3d 158 (1st Cir. 2005), to the extent he suggests the Board there held that an employer's inability to recruit qualified employees can never remove a subcontracting decision from the scope of mandatory bargaining.

The judge acknowledged that the building the Respondent constructed to house contractor employees cost up to $200,000, but he did not mention this cost when analyzing the Respondent's capital expenditures. We find that this expenditure did not remove the decision to subcontract unit work from the scope of mandatory bargaining. See *Bob's Big Boy Family Restaurants*, 264 NLRB 1369, 1371 (1982) (finding that capital transactions valued at $30,000 in connection with subcontracting were not substantial enough to relieve the employer of its obligation to bargain over its subcontracting decision); *Whitehead Bros. Co.*, 263 NLRB 895, 898–899 (1982) (finding company had duty to bargain over decision to subcontract delivery of its products and terminate its trucking operation, notwithstanding that the decision entailed rejection of a proposed capital investment).

[4] We shall modify the judge's recommended Order (as modified by his errata of October 21, 2019) in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). At the compliance stage of these proceedings, the Respondent may introduce evidence that restoration of the unlawfully subcontracted work would be unduly burdensome, provided the evidence was unavailable prior to the unfair labor practice hearing. *St. Vincent Medical Center*, 349 NLRB 365, 367 fn. 5 (2007); *Lear Siegler, Inc.*, 295 NLRB 857, 861–862 (1989).

[5] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within

notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 19, 2018.

Dated, Washington, D.C. July 8, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of the paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Andrea J. Vaughn, Esq., for the General Counsel.
Kenneth Henley, Esq. (Law Office of Kenneth Henley) of Boca Rotan, Florida, for the Charging Party.
Theresa A. Queen, Esq. and *David Barger, Esq. (Greenberg Traurig, LLP)* of McLean, Virginia for the Respondent.

DECISION

INTRODUCTION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case considers an employer's statutory duty to bargain with its employees' union over the subcontracting of emergency services work historically performed by employees at the employer's synthetic fiber production facility.

The government and the union allege that the employer's admitted refusal to bargain over the subcontracting decision violated the employer's bargaining obligations under the National Labor Relations Act (Act). The government and the union further contend that the employer's subsequent unilateral implementation of the subcontracting decision also violated the Act. The employer argues that the subcontracting decision and implementation were outside the ambit of Act's bargaining obligations. For the reasons discussed herein, I agree with the government and the union find that the employer violated its bargaining obligations under the Act.

STATEMENT OF THE CASE

On June 21, 2018, the Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of DuPont Workers (Union or ARWI) filed an unfair labor practice charge alleging violations of the National Labor Relations Act (Act) by DuPont, Inc., docketed by Region 5 of the National Labor Relations Board (Board) as Case 05–CA–222622.[1] Based on an investigation into this charge, on November 28, 2018, the Board's General Counsel (General Counsel), by the Region 5 Acting Regional Director, issued a complaint and notice of hearing in this case. The Employer filed an answer denying all violations on December 12, 2018, and an amended answer on May 31, 2019.

A trial in this matter was conducted June 4–6, 2019, in Richmond, Virginia.[2] A posthearing joint motion of Counsel for the General Counsel and Counsel for the Respondent to correct the transcript was granted by order dated August 8, 2019. Counsel for the General Counsel and the Respondent filed post-trial briefs in support of their positions by August 12, 2019. Counsel for the

[1] In the portion of the charge filled in by Region 5 personnel (top right corner of GC Exh. 1(a)), the charge is listed as being filed on June 18, 2018. Based on (1) the representations of counsel (Tr. 11), (2) the declaration supporting the charge indicating the charge was filed June 21, 2018, (3) the attachment to the charge alleging an announcement on June 20, 2018, as a basis for the charge, and (4) the undisputed record evidence that key events on which the charge was based occurred on June 18 and 19, 2018, I find that the charge was filed June 21, 2018.

[2] At the commencement of the hearing, the General Counsel moved to amend paragraph 5(b) of the complaint to correct an error in the date pled for the final effective date of a collective-bargaining agreement. This unopposed motion to change the date from August 1 to September 1, 2018, was granted. Further, at the commencement of the hearing, the Respondent admitted the supervisory and agency status under the Act of Andre Holmes, Darrin Meenach, and Cheryl Yanoschak. (Tr. 12–14.) Finally, at the hearing, the parties agreed that the correct name of the Respondent is DuPont Specialty Products USA, LLC, as a successor to E. I. du Pont de Nemours and Company (Tr. 8, 183–185), and the caption is amended to reflect this. Throughout this decision the Respondent is referred to as DuPont or Employer or Respondent.

Respondent filed a letter of supplemental authority on September 20, 2019. Counsel for the General Counsel filed a response on September 30, 2019.

On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Richmond, Virginia, and has been engaged in the business of manufacturing synthetic fibers and related products. In conducting its operations during the 12-month period ending October 31, 2018, the Respondent sold and shipped from its Richmond, Virginia facility goods valued in excess of $50,000 directly to points outside of the State of Virginia. It is alleged and admitted that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), and (6), of the Act. It is further alleged and admitted that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce within the meaning of Section 2(7) of the Act, and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Findings of Fact

A. Background

DuPont has operated the Spruance plant, located along the southern border of the city of Richmond, in Chesterfield County, Virginia, since 1929. The site is comprised of over 500 acres and currently includes some production by other or related companies. For many years—longer than 45 years, as testified to by the witness in our hearing with the most seniority—the three major products produced at the Spruance plant by DuPont have been the synthetic materials Kevlar, Tyvek, and Nomex. Two additional major products—Zytel and Mylar—are produced onsite by separate or related companies. The Spruance plant operates with four rotating shifts, and a fifth fixed-day shift. On this basis, the plant is in production 24 hours a day, 7 days a week.

Since 1947, the production and maintenance employees at the plant have been represented for purposes of collective bargaining by the ARWI. Currently the Union represents about 1,000 production and maintenance employees. In addition, the ARWI represents a separate bargaining unit at the facility currently composed of less than 100 clerical, technical and office employees at the facility. The International Brotherhood of Electrical Workers (IBEW) also represents a bargaining unit of instrument and electrical workers. The Mylar plant onsite has an independent union representing employees. In total there are approximately 2000 employees at the plant, but a significant number are non-bargaining unit "exempts," i.e., clerks, technical operators, and engineers.

The ARWI and DuPont have negotiated numerous collective-bargaining agreements over the years covering the terms and conditions of bargaining unit employees. A September 2012 agreement covering the production, maintenance, service, and technical wage roll employees was renewed in 2015 (the 2015 Agreement). A new agreement for this unit was negotiated during the summer of 2018 and went into effect on September 1, 2018 (the 2018 Agreement). That agreement is scheduled for termination no earlier than August 21, 2022.[3]

In addition to impromptu meetings as necessary, the ARWI's executive committee regularly meets twice a month with the Employer to discuss labor-management issues arising during the term of the contract that are not directly part of the grievance procedure. As the union chairman for the executive committee, Donny Irvin, explained, the committee "handle[s] the day-to-day operations at the plant. So any rule, procedure, anything that needs to be bargained that's not contractual comes to the exec committee."

The chemicals and production processes involved in the plant's production carry a potential for risk of employee and even community injury. The risk of fire, explosion, or exposure to toxic chemicals is taken seriously by all involved with the operation of the plant. Over the years there have been incidents that led to groups of employees having to, at least, be evaluated at the hospital. At the same time, as far as the record shows, the use of these chemicals and processes at the plant has been longstanding, and inherent to the production processes. There were no changes in this regard in many years. DuPont maintains an extensive array of safety-related and emergency-related protocols and procedures, including beginning each meeting, no matter the subject, with some reference to a safety issue. This is called a "safety contact."

B. DuPont's Emergency Services

For many years, at least since 1974, and until the recent unilateral subcontracting that is the source of the instant dispute, DuPont maintained an emergency response team (ERT) at the Spruance plant composed largely of bargaining-unit employees from the Union.

The Spruance Plant ERT was composed of a fire brigade, hazmat team, and a medical emergency response team (MERT). The MERT members had EMT level B training to provide first-aid and medical care for illness and injury in incidents short of IDLH events. The ERT (fire and hazmat) and MERT were separate until approximately 2008, when they merged under the heading ERT. The ERT's function was to respond to emergency calls at the site, including conditions caused by adverse weather, gas releases, smoke alarms, fires, spills, rescues, medical first

[3] The bargaining unit covered by the 2015 and 2018 Agreements is composed of the following Spruance plant DuPont employees:

> All production, maintenance, service and Plant technical hourly wage roll employees at the Plant included within the unit appropriate for collective bargaining purposes certified in an order of the National Labor Relations Board in Case Nos. 5–R–2724, 5–R–2773, 5–R–2791 bearing date of January 31, 1947, but excluding all employees classified as instructors, instructresses, security officers, United Service Employees, employees when working as relief supervisors and supervisors-in-training, and all supervisory employees set forth ln said cases with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

aid, and other emergencies. The fire brigade responded throughout the facility and was often activated by someone pulling one of the fireboxes situated throughout the facility. MERT was responsible for any type of medical emergency and responded to firebox pulls but also to a medical emergency number on the plant's internal phone exchange.

A central fire station housed a hazmat truck and a pumper truck, and there was additional firefighting equipment in trailers by the fire station. MERT had an ambulance and each MERT member carried their own "MERT bag" with needed medical supplies.

Routinely the ERT members responded to reports of smoke, or flames, and employee accidents and injuries. In many cases these were small matters—for instance the smoke might be determined to have come from a motor or belt that was misfiring or burning up—but, of course, any such report had to be investigated. In the more unusual case—arising a few times/year"—that involved a serious fire or incident "immediately dangerous to life or health" (IDHL), fire and emergency medical services from the city of Richmond or Chesterfield County were called in to take over. The ERT captain on duty was usually charged with assessing whether the ERT would need backup.[4]

The parties agree that no governing laws or regulations require that DuPont maintain an ERT. Nor do any of DuPont's internal policies.

Until it was subcontracted to a contractor named FDM on September 1, 2018, DuPont's ERT served as a first-line responder for the entire Spruance facility. This included the separately operated Zytel and Mylar plants onsite as well as the plant utilities operation that since February 2018, has been run by a company called Veolia.

The ERT was staffed by bargaining unit employees—mostly from the ARWI, and about six to eight from the IBEW unit—and also by a few "exempt" nonunit employees who volunteered to train for and participate in the fire brigade and MERT units. In the spring of 2018, there were approximately 52 total members, 29 in the fire brigade and 23 with MERT. As of September 1, 2018, there were approximately 40–50 employees who were members of the fire brigade and hazmat and somewhat less than 20 on the MERT group.[5]

Each of the plant's rotating 8-hour shifts (shifts A, B, C, and D) was staffed to ensure there was sufficient ERT presence 24/7 at the plant. (The permanent day shift—to which many senior employees gravitated over time—did not have a fire brigade, although it did have a MERT group.) There was a requirement of between six and eight fire and hazmat employees per shift, and a minimum of two per shift for the MERT side.

Like a community volunteer fire department, the ERT-member employees worked their regular production, maintenance, or other jobs at the facility, and responded to a possible medical or fire emergency when they were at work and an alarm or other call went out for their services. In the fire brigade, an employee typically began as a firefighter and with additional training could progress to a pump operator, then a lieutenant, and ultimately to the highest role for unit employees, captain. A chief supervised the ERT and he was a non-bargaining unit supervisor.

ERT members came from all the different areas of the plant, for a variety of reasons. As the Union's Executive Committee Chairman Irvin testified, "We tried to come up with a plan that would evenly disperse the membership across the site," which lessened the response time, heightened the ability of the plant to continue running with remaining staff during an ERT incident, and met DuPont's concern that the cost of the ERT be dispersed through the cost centers attributed to the various product lines. In addition, as Irvin explained:

> It was always important to us that we had people from the area responding because they would be the most knowledgeable people of the area. . . . [E]very area had its own hazard and it was most beneficial so that when the whole brigade responded, you had a resident expert that was there that knew about the hazards and . . . where they were, where to turn them off, and it was just was really important to us.

Although employees "volunteered" for the ERT jobs, the work was paid. Employees were paid for their time training, for completing certifications, and for responding to calls. Pay was based on their regular salary. Because it was in addition to their regular work at the plant—which itself might include overtime pay—much of the emergency services work was paid at overtime rates. Each individual's daily or weekly entitlement to overtime pay for ERT work was based on his or her overall hours. For some employees, the ERT provided a lucrative source of additional hours and overtime pay over the course of the years. Although employees chose to be on the ERT, they could be disciplined and/or removed if they failed to perform their duties including attending or completing required trainings. Completion of all the training required for new or prospective ERT members could take up to a year of monthly course work and practical training until they were ready. Through a combination of overtime in their regular production or maintenance job, and overtime performed on ERT, ERT employees were some of the highest paid employees at the plant.

The provisions of the ERT program and changes to it were

[4] According to documents prepared by DuPont for discussion with the Union (GC Exh. 14 at 4), in 2016, the ERT responded to 721 calls and in 2017, it responded to 657 calls. In both years, the overwhelming bulk of the ERT calls involved evaluating confined space permits. Fires accounted for 2 and 3 percent of the calls; medical constituted 6 and 8 percent. Here, I reproduce the data set forth in the Respondent's June 14, 2018 (GC Exh. 14 at 4) memo on the subject:

What is the breakdown of the calls that Emergency Service's responds to? Data for the past 2 years is as follows:

	2016	2017
Total Calls	721	657
Confined Space Permits	568 (79%)	479 (73%)
Investigations	24 (3%)	57 (9%)
Medical	46 (6%)	55 (8%)
Fire Alarms	49 (7%)	33 (5%)
Fire	12 (2%)	18 (3%)
Miscellaneous	16 (2%)	10 (1%)
HazMat	5 (1%)	5 (1%)

[5] I am not confident of the accuracy of these numbers, although the precise numbers are not critical to the case. I note that R. Exh. 28, which is undated, but which was composed sometime after March 26, 2018, lists 27 fire/hazmat/CS members and 23 EMS members.

routinely negotiated with the ARWI executive committee. In one instance, in 2007, the parties entered into a settlement agreement after a dispute over a proposed decrease in training hours for the fire brigade. After months of dispute, the Union agreed:

> that the parties have reached the point of impasse after 18 meetings with respect to the bargaining concerning the Emergence Response Team (ERT) that has been ongoing since December 2007, and the Union agrees that it will not object to the Company implementing the ERT training hours proposal [as attached].

In exchange for the Union's agreement the Company promised that:

> current ERT members will be made whole by providing training opportunities . . . for the months of February and March 2008, [however,] [i]n the event the NLRB Regional Director determines backpay is appropriate in lieu of training opportunities . . . that determination will supersede the Company's obligation to provide make-up training opportunities for current team members for February and March 2008.

More frequently, the bargaining over ERT was routine and agreements accomplished without dispute. Monthly training schedules were developed by DuPont and then approved by the Union's executive committee. In recent years, there had been extensive bargaining over changes made to ERT overtime policy. In 2016, a new fire captain, Terry DeGuentz, pushed for adoption of more strenuous qualification requirements. A change from local training standards to a national "Pro-Board" certification for ERT firefighters was discussed and bargained with the Union. However, when employees had difficulty passing the training, at some point in 2017, management bargained with the Union a limit of three chances for an applicant to take the Pro-Board test for firefighter. At one point, in response to staffing concerns, management and the Union even discussed the possibility of requiring employees to apply for the fire brigade.

Ongoing staffing difficulties led to further ERT bargaining. In the Spring of 2017, after negotiations in which DuPont feared that a bargaining impasse would be likely (GC Exh. 15 at 12), there were agreements reached between the Union and DuPont to permit the use, in prescribed circumstances, of Chesterfield County firefighters to fill out the roster of the ERT when insufficient employee members could be induced to sign up for particular shifts.

In response to persistent Union demands to create an ERT on the permanent day shift, in 2017, DuPont agreed to establish a daytime fire brigade, but the details were not worked out before the subcontracting in this case rendered the issue moot.

C. ERT problems

Richard Lukhard, a veteran of the Chesterfield County Fire and EMS, became Spruance's chief of emergency services—more colloquially referred to as the fire chief—in July 2017. Lukhard replaced Terry DeGuentz, who left in April 2017.

At the hearing, Lukhard testified to the difficulties that DuPont was having staffing the ERT. There were not enough applicants, and a number of the applicants could not pass the training, or once beginning training had withdrawn from the program. As employees who were on the fire brigade retired, DuPont had some difficulty replacing them. Between 2016 and 2018, there were periods of time when there were vacancies in the ERT fire brigade which DuPont had trouble filling.

Lukhard testified that the practical portion of the Pro-Board testing was done at Louisiana State University (LSU) and there was significant expense in having to transport applicants there, particularly because a number of applicants were failing the Pro-Board testing multiple times. Lukhard first proposed in September 2017, limiting the number of times an applicant could take the Pro-Board test and eventually did away with Pro-Board testing altogether, after creating graphs for his direct supervisor—Cheryl Yanoschak—making the case that "we could do training for the brigade just as efficiently locally without having to go to LSU and not be Pro Board certified." Lukhard also expressed concern that even for employees interested, and dedicated and capable, "getting the experience is very difficult." He testified: "There is not a lot of calls for service or emergency calls thank goodness to run. But so you can go through training and you can do all the required training, but you still don't have the real-world experience of going out there and dealing with . . . these emergencies." Another problem described by Lukhard was that at times ERT members were performing critical work in their regular position and could not leave work to address an ERT call. If there were insufficient ERT members on staff on a given shift this could create a problem with ERT responses.

Lukhard testified that apart from the problems of Pro-Board testing, he viewed with concern what he saw as a decreasing pool of employees interested in being on the ERT. Due to retirements and departures "there was not a very good field of folks that could train up or that were interested in training up to become officers, lieutenants and captains and shift commander." Lukhard testified that "I didn't see a good pool of folks coming up that the desire and/or the potential to fill those officer vacancies and critical positions." In particular, there was trouble staffing the officer positions on the fire brigade—the lieutenants and the captains. DuPont Program Manager Darrin Meenach attributed this to the fact that those positions require more expertise, more training and "substantial leadership to make the right calls and lead the teams."

D. The decision to subcontract emergency services

Sometime in the spring of 2018, DuPont made the decision that beginning September 1, 2018, it would subcontract the Spruance plant emergency services work to a company called FDM. This decision was made without disclosing the matter to the unions until mid-June.[6]

Lukhard laid claim to initiating the idea and looking into its feasibility. He testified that the subject of contracting out the ERT first came up between him and his direct supervisor, Yanoschak, "in December time frame of 2017," at which time he started doing "a lot of the background leg work to see if it was even feasible." Lukhard testified that his "actual

[6] I note that throughout this decision I use the terms "contracting out" and "subcontracting" interchangeably to describe the Respondent's plan to use FDM to perform emergency services work historically performed by the Respondent's employees.

recommendation" to management that the ERT be contracted out occurred in the "early March [2018] time frame," or into April, when he gave a PowerPoint presentation to the "the senior leadership team, although "[o]bviously, I had conversations with my direct supervisor, Cheryl Yanoschak, prior to that presentation."

The record does not state who this "senior leadership team" was (Lukhard does not say). Other than a PowerPoint presentation (discussed below), there is no documentation of what was said to them. Of the Respondent's three witnesses at the hearing (Holmes, Meechan, and Lukhard), only Lukhard testified to involvement in the decision. But the evidence shows that the matter was presented up the ladder—to Lukhard's supervisor, Yanoschak, to "somebody in corporate" named Kimberly Richardson, and to L.G. Tackett, who was interim plant manager but referred to in documentation as the Global Operations Manager of Safety and Construction. Once a Spruance plant manager was named, Tackett was the individual to whom the Spruance plant manager reported. Based on internal DuPont documents, other DuPont managers were involved in the decision. On April 24, Yanoschak sent an email to Tackett seeking his approval to move forward with the contracting out plan.[7] Tackett responded to this request for approval by asking for a summary of the proposal that he could share with other managers: "Cheryl, can you put me a couple-page summary on this I can share with Rose and Brent. Perhaps I can set a call up and you can share."

DuPont Human Resources Manager Andre Holmes, then chief bargainer for DuPont at Spruance, later wrote an email on July 11, 2018, in which he declared that the subcontracting decision had been approved by Rose Lee, VP of safety and construction, and by Tackett.

Neither Yanoschak, nor Tackett, nor Lee, nor Richardson, nor Brent, testified at the hearing.

Thus, although he was not the decision maker on the subcontracting, Lukhard's opinion as to why he was in favor of the contracting out was the only one presented at the hearing. To summarize, Lukhard testified that he made the recommendation to contract out the ERT based on the "potential significant hazards" used, stored, and transported on site, "challenges with staffing . . . especially with the critical leadership positions," and difficulty obtaining experience for new ERT members. Lukhard complained of lack of physical fitness of some of the ERT members and recruits, and cited a few examples of what he viewed as inadequate performance by ERT members.[8] Based on all of this, Lukhard testified that he made "the recommendation that we should bring contract, dedicated folks that already had experience."

In addition at the hearing, Lukhard made a point of claiming that, at least as far as he was concerned, the decision to contract out, "had nothing to do with money from my perspective, because I didn't even know what the cost involved was going to be when I first . . . started working on the recommendation." According to Lukhard,

> It had everything to do with the inability to recruit qualified experienced members, and the . . . concern with the hazards on the site and the potential emergencies that could occur and not having qualified folks and not seeing any answer, quick answer to the lack of sustainability of the system. . . . [T]o me it was an unsustainable system that had been the victim of just time and the change in the world today with volunteerism and people stepping up that want to help.

Notwithstanding Lukhard's testimony as to his own motivations, the documentary evidence makes clear that in the spring of 2018, as DuPont finalized its plans (in secret from the Union) for subcontracting the emergency services work, the associated cost savings were not an insignificant consideration.

In his testimony, Lukhard suggested (Tr. 524) that in recommending the subcontracting to DuPont leadership he presented them with a PowerPoint demonstration in the spring of 2018. He did not specifically identify the PowerPoint presentation but there are two in the record from that time period.

A March 15, 2018 five-slide PowerPoint for a Spruance staff meeting—each page of which was marked "confidential"—set out a proposal for two options for contracted emergency services. (GC Exh. 12.) Option 1 provided for 9 firefighters each working 3-person 24-hour shifts, with 3 DuPont exempt employees performing the roles of shift commanders to the FDM staff. Option 2 provided for 12 firefighters working 3-person 12-hour shifts, with 4 DuPont exempt employees performing the roles of shift commanders to the FDM staff. Slide 3 of this PowerPoint was titled "Summary of Costs." It stated:

> **Summary of Costs**
>
> - **Current Costs = $2.0MM**
>   - **Training**

[7] Yanoschak wrote:

> Bobby Lukhard and I spoke with both Kimberly Richardson and the Spruance Labor Team yesterday to bring them up to speed on where we are with our Emergency Services Future State and Contingency Plan. We are now ready to move forward with getting a contract in place with FDM to provide contract emergency services personnel and begin spending to get the 12 contract personnel hired, trained and in place as our contingency plan (strike or otherwise). The current estimate is that it will take 75-90 days to get "ready" state (15-30 days to get a contract in place, 30 days to get personnel hired, and 30 days to do all the training we can off-site) Once FDM gets all 12 folks hired, we will be spending at a rate of $60M/month and will carry that added cost until bargaining is completed or we are forced to put the contract team in place and not pay for DuPont staffing. Both Kimberly and the Spruance Labor Team support our plan and us moving forward immediately. Do we have your approval to drive forward? [Original Emphasis.]

Lukhard admitted speaking with Richardson. However, he denied speaking about the subcontracting to the "Spruance Labor Team." I note that Yanoschak's email is the first suggestion that DuPont viewed the subcontracting as part of a collective-bargaining strategy, with implementation planned for the expiration of the current labor agreement, either in response to a strike or the completion of bargaining.

[8] At Yanoschak's direction, in mid-2018—well after the subcontracting decision had been made and announced—Lukhard started documenting "serious issues," many related to staffing, that the ERT was having. This document (R. Exh. 37) listed five incidents discovered or researched by Lukhard in May and June 2018, where an ERT team member was late or failed to show up for a training or shift. This list was created after the decision to contract out was made, and after the Union's unfair labor practice had been filed, surely in defense of both.

- **Staffing & Confined Space Overtime**
- **Fire Inspector Position**

- **Immediate cost reduction from elimination of Pro-Board Training and Testing = $350M spent over past 2 years**
- **Contract Option 1 (24hr) = $980M Savings= $1.0MM Annually***
- **Contract Option 2 (12hr) = $1.3MM Savings = $675M Annually**

***Note: There is a one-time cost associated with Option 1 to provide living quarters for 24-hr personnel = $175M**

The next page of the PowerPoint presentation (slide 4) listed the "Soft/Added Benefits" of the contracting out. This page listed the elimination of "Fatigue Risk Management implementation issues," the "rededication" and "focus[ ]" of DuPont hourly employees to their area assignments, the creation of "Dedicated and Experienced Full-Time Emergency Responders," the ability to do "Continuous training . . . mostly on-site during normal work hours," faster response times, and "enhanced . . . rescue planning support."

A final slide (slide 5) lists "concerns & risks," noting "potential walkout of current members when discussion of contracting starts," and also a concern with "contract staffing turnover," which it is also noted "should be mitigated if we can offer [a] 24-hours on/48-hours off shift schedule."

The above cost projections were restated in an updated PowerPoint dated April 24, 2018, created by DuPont. (GC Exh. 13), and perhaps by Lukhard. See, Tr. at 524. The updated PowerPoint was similar to the earlier March 15 PowerPoint, but reflected DuPont's decision to go with Option 1 for contracted emergency services, entailing the 24-hour shifts. As to costs it stated:

Summary of Costs

- **Current Costs = $2.0MM**
  - **Training**
  - **Staffing & Confined Space Overtime**
  - **Fire Inspector Position**
  - **Future State Option = $1.0MM Savings= $1.0MM Annually**
    - **One-time costs associated with the transition:**
      - **On-site living quarters for 24-hr personnel = $175-200M capital**
      - **Contingency Plan (Strike or Walk Out) = $75M/month in cost**
        - **75-90 days to get contract in place, complete hiring and provide initial training. Will then have "carrying" cost each month that DuPont staffing remains in place when contract team is set up and ready to go**

The April 24 version—also sent with a warning to "maintain confidentiality"—reflected that DuPont had chosen to use 12 total contracted employees—9 firefighters each working 3-person 24-hour shifts, with 3 DuPont exempt employees as shift commanders. The PowerPoint restated that there would be cost savings of $1 million annually by moving to the contracted emergency services, and also noted two "one-time costs associated with the transition": first, a cost of $175-200,000 to create on-site living quarters for the contract employees working 24 hour shifts, and second, a $75,000 a month cost for the summer of 2018 to ready the contract employees in the event of a "strike or walk out" by unit employees before September 1, 2018.

An email accompanying the March 15 and April 24 PowerPoint was sent by Yanoschak to then HR Manager and chief bargainer Holmes, DuPont Program Manager Darrin Meenach (who also had collective-bargaining and labor agreement implementation responsibilities at Spruance), labor consultant Valerie Jacobs, and Mary Anne Sparks, a DuPont labor relations analyst. In the email, Yanoschak instructed the group to keep the PowerPoint presentations confidential and not to share their contents with anyone other than Jacobs, Lukhard, Yanoschak, Tackett, and John Lee (unidentified in the record), and Sparks.

Other evidence of the centrality of the cost savings to the decision to subcontract is found in an April 27, 2018 email exchange on which Lukhard and Yanoschak were copied. In it, Tackett approved a "cost sourcing variance request" requested by Lukhard, but prepared by DuPont contract administrator Keith Jenkins writing under Lukhard's name. The document, which appears to present justification for failing to seek competitive bids for the contract with FDM to staff the fire and emergency services, states:

> **Variance Impact on Requesting Business (benefits or negatives as a result of this variance):**
>
> **Comments From Requestor:**
>
> **One month time frame for bidding, contract issue, and site training to support this effort. There is no other\ supplier that supplies this type of service from a local basis. Site will recognize a significant cost savings in overtime as a result of this effort.**

Plans for the contracting went ahead in the spring of 2018. Lukhard was familiar with the contractor, FDM, and approached them and one other company about whether they could provide the 24-hour coverage that DuPont would want. FDM was responsive and ended up being hired. As set forth in a June 18 email between DuPont managers, the plan was that under the FDM arrangement that there would be four FDM firefighters on site at any given time, "always with site apparatus, whether at the Fire House or out on the site doing practice and training, so they can get quickly to a scene for a size up and call for additional resources if needed." With FDM, DuPont would continue to contact "county Fire and EMS for additional support for the few times/year that we need to provide an offensive approach into an IDLH environment—just as we have set up today."

The documentary evidence suggests that the contract with FDM was finalized in early June, with a 3-year contract signed for a total of $4 million. The only change in operation from earlier drafts was that initially the shift commanders would be FDM personnel, meaning that all four emergency services personnel on the shift would be FDM employees. There would be three of these four-person shifts, each composed of two fire fighters, one lieutenant, and one shift commander. However, DuPont made clear internally that "Within the first year we expect to transition the Shift Commander's position to a DuPont Exempt position."

The contract with FDM was written to permit DuPont to make that change at its sole election.[9]

According to the job descriptions written by Lukhard and on which basis the FDM employees were hired, the shift commanders (be they FDM or DuPont employees) were to take "first line direction from the Chief of Emergency Services," i.e., from Lukhard. They were also to "[c]onduct investigations, report findings, and make recommendations to the Chief for disciplinary actions." The firefighters and lieutenants were to perform projects and duties "assigned by the Shift Commander and/or Chief." Thus, the contractors were under operational control of DuPont's Emergency Services Chief, i.e., Fire Chief Lukhard.

Lukhard wrote the job descriptions for the FDM positions. FDM did the hiring but Lukhard reviewed applicants' "bios to make sure they met the expectation of the job descriptions." These employees were hired—or, at least, were identified and accepted employment—in the spring of 2018, perhaps in May or June.

E. Announcement to unions of plan to subcontract the ERT

1. Preparation for meeting with unions

As mid-June approached, DuPont made plans to tell its employees and unions that it was going to subcontract the emergency services.

On June 14, 2018, Yanoschak sent Meenach, Jacobs, Holmes, and Sparks an email with a draft "Q&A" about the upcoming ERT contracting out. She indicated that this was to be finalized into a document that could be used in discussions with the unions in an upcoming meeting.

Among the benefits of the contracting out of emergency services touted on the Q&A draft were faster response times, increased skill and capability, improved overall service, and

> Reduced cost of services—Significant reduction in overtime, training, and equipment and apparatus cost.

The Q&A indicated that there were no other fire protection changes "being considered at this time . . . in addition to the Emergency Services changes."

2. June 18 meeting with unions

Andre Holmes, an HR consultant for DuPont, and at time the lead bargainer for the Spruance plant, scheduled a meeting for June 18, with the President of the ARWI, James Palmore, and the business manager of the Spruance plant IBEW, Craig Irvin. Attending the meeting with Holmes was Meenach and Valerie Jacobs, a consultant who assisted DuPont with collective-bargaining negotiations.[10]

At the meeting, Holmes informed Palmore and Irvin that DuPont "had made a decision to outsource our emergency services." There was little discussion after this. Palmore asked if DuPont was "going to bargain it," and said that he wanted DuPont to meet with the ARWI executive committee. Holmes promptly scheduled a meeting for the next day, June 19, with the executive committee, describing the subject of the meeting in the invitation email as an "Emergency Response Discussion."

3. Preparation for June 19 meeting with unions

That evening, June 18, at 8:30 PM, Yanoschak sent an email to Jacobs, copying Meenach and Holmes, providing answers for questions about the contracting out for use by management in the next day's meeting with the Union executive committee. Yanoschak's email included an answer to Jacobs' question about the "financials":

> Financials- $1.7MM overtime costs (staffing and confined space support); Training Costs $450M. Cost of the contract services $ 1.1MM ($1MM Savings annually).

It also included an answer to the question of whether, if staffing overtime on the ERT were eliminated through an increase in employees available for ERT per shift, would the current in-house model be a good "financial option." The answer provided was that if the situation could return to as in "years past when they used to have 25-26 people/shift . . . we could possibly eliminate staffing overtime." However, according to Yanoschak this would mean increased training costs of about $250,000, would lead to too many people leaving their job assignments to respond to a call, and "[f]inally, our past 2 years of experience trying to recruit folks, has been less than fruitful or successful."

The email also provided information about the costs associated with "support[ing] individual confined space rescue[s]"—estimated to be $2000 per entry, with the anticipation that the "full time contract emergency staff" would support confined space entry needs as part of their staffing costs. In addition, the email answered questions about how other local plants and other DuPont plants handled emergency services. The practice at other DuPont facilities was mixed. The local companies with which Lukhard was familiar used a model similar to the Spruance plant's current model.

The email also made clear that with FDM as the contractor there would be four FDM firefighters on site at any given time, "always with site apparatus, whether at the Fire House or out on the site doing practice and training, so they can get quickly to a scene for a size up and call for additional resources if needed." With FDM, DuPont would continue to contact "county Fire and EMS for additional support for the few times/year that we need to provide an offensive approach into an IDLH environment—just as we have set up today."

4. June 19 meeting with unions

The meeting with the unions took place at 11 AM. Present for the ARWI were Donald Irvin, Mickey Galderise, James and Keith Palmore, David Roney, Colby Creech, and Eric Irvin, and

[9] The final contract with FDM stated:

> At any point during the period of agreement, DuPont may elect to transition the Shift Commander position from a contract position to a DuPont exempt position with 60 days' notice to FDM, thus FDM will reduce the required workforce and billing accordingly.

[10] As noted, at the commencement of the hearing DuPont admitted the supervisory and agency status of Meenach and Holmes under the Act. However, it denied allegations of Jacobs' similar status. I find that based on the record evidence—her attendance at labor-relations meetings on behalf of DuPont, the hiring of her to assist with collective-bargaining, and her inclusion and participation in confidential correspondence deemed only for management, and no contrary evidence—that Jacobs is an agent of the Respondent under the Act.

Kevin Chaplin. Craig Irvin, the business agent from the IBEW was also present. For management, present were Holmes, Meenach, Jacobs, and Yanoschak.

Before the meeting, at 9:01 AM, DuPont distributed by email "to all Spruance Employees," an Employee Information Bulletin, stating that:

> The Spruance site has notified the ARWI P&M and the IBEW unions' leadership that we intend to transition to contracted out emergency services beginning September 1, 2018. We will be talking to the unions to explore how to manage through the transition.

Holmes led the meeting. After beginning with a "safety contact," he turned to the point of the meeting: to announce that DuPont had made the decision to contract out the ERT. Holmes stated that "We said that the decision was management's, but we would bargain the effects of outsourcing the emergency services." Holmes told the Union "we do not want to be in the fire business. We want to make products for the plant." Holmes made clear to the Union that "I am not here to bargain" about the decision to contract out the ERT. However, he indicated that DuPont would be willing to meet to bargain the effects of the contracting-out decision and that DuPont wanted a smooth transition to the contracted emergency services on September 1, 2018. Holmes told the Union that "[w]e understood that there would be a loss of overtime for our employees and that it would affect our employees. So we were willing to have those discussions with the Union." According to Irvin, Holmes said that the ERT was "costly, and we can reduce the cost." Irvin asked him, "are you willing to bargain that?" Holmes replied, "I am not here to bargain. I am here to tell you what we are going to do."

At the hearing there was a pointed credibility dispute about the rationale provided at this meeting by Holmes and the management team for the subcontracting. Holmes testified that he told the Union "that we are basing this on skills and capabilities." DuPont wanted "better quality firemen," "professionals." In his testimony, Holmes adamantly denied that he or the other DuPont negotiators mentioned costs or cost savings as a rationale for the subcontracting decision.

Irvin disputed this. He testified that Holmes and the management team relied on cost savings as the rationale for the ERT subcontracting—indeed, it was the only motivation for it that he recalled them stating. Irvin's notes from the meeting reference "Item #1 ERT elimination of all—outsource/2.1 million/reduce plt cost—what is the cost?/refusing to bargain." Irvin testified that $2.1 million was the amount that DuPont management said in this meeting that the ERT had cost in the previous year. Irvin testified that he questioned Holmes at the meeting as to how he came up with the figure of $2.1 million, but that he did not get answers other than "its costly, and we can reduce the cost."

Both Holmes and Irvin agree that Irvin asked about the costing associated with the ERT and its outsourcing, and whether DuPont would be saving money by replacing the ERT with contractors. Irvin testified that management responded by saying that "we will be able to save a substantial amount of money for the plant site." This prompted Irvin to ask Holmes "what the price difference was between the two." Holmes told Irvin that "if I was making an information request, to put it in writing." Irvin retorted that an oral request "should suffice in a bargaining situation," to which Holmes replied this "wasn't a bargaining session."

However, at the hearing, Holmes repeatedly and emphatically denied saying anything at the June 19 meeting about cost savings. When Irvin said that "if the Company really wanted to save money, you wouldn't staff any of it . . . . you could just . . . do away with the fire services and use Chesterfield Fire Department," Holmes testified that he considered Irvin to be being "a little smart aleck," and that therefore there was no response made to this comment. However, Meenach testified that there was a response, that "[w]e said that's not the case. It's not about the cost. We could do that, but that's not the plan. We need to have safe, professional emergency responders on the plant site."

Holmes maintained that in response to Irvin's questions about the cost savings associated with the outsourcing, either Meenach or Yanoschak "[a]t that time, we told him we didn't know. We hadn't crunched numbers to see what the savings were around. The decision was basically to improve the site's capability to respond to emergencies." Holmes testified not only had he not stated that cost savings was behind the contracting out decision, but that he told Irvin and the Union in the meeting that he "did not know if there was any cost savings." Holmes testified that at that time of the June 19 meeting he had no knowledge of whether or not there was cost savings associated with the contracting out. Meenach also testified that he did not provide any cost figures to the union in the meeting because he did not know that information at the time. In fact, Meenach, in his testimony, went even further. Asked at the hearing what Irvin said in the June 19 meeting about the contracting out saving the Company money, Meenach responded, somewhat nonresponsively: "So we made it clear that it wasn't about cost. It was about making sure we had the right staffing levels and the right safety at the plant."

The difficulty with Holmes and Meenach's insistence that they did not speak of costs or of savings, because they did not know anything about the subject—as if the thought of cost savings had never occurred to them—is that the internal DuPont documents, referenced above, pointedly contradict their claim. These documents demonstrate that costs savings associated with the contracting out—specifically cost savings from reduced overtime and training costs—were something that all management attendees at the June 19 meeting (Holmes, Meenach, Jacobs, and Yanoschak) were cognizant of and had discussed in emails. Indeed, as recently as June 14, this group had been on emails where the projected cost savings of the ERT contracting out was specifically discussed as a talking point for the upcoming discussions with the Union. Holmes even admitted on cross-examination to reviewing documents containing cost estimates before attending the June 19 meeting. No explanation for this glaring contradiction has been offered.

Given this, it is easy to conclude (and would be hard not to conclude) that Holmes and Meenach's testimony that as of the June 19 meeting they had no knowledge of the costs associated with the subcontracting or the ERT was flatly false. This strenuously offered but false claim was offered by Holmes and Meenach as corroboration, indeed, as supporting proof, that they did not and could not have mentioned cost savings as a rationale for the subcontracting in the June 19 meeting. But it is not

believable because the evidence shows that Holmes and Meenach were well aware of the specific cost savings from overtime and training anticipated by DuPont as a result of the subcontracting. For this reason, I am inclined to believe Irvin's testimony that cost savings was offered as a rationale for the subcontracting, and to disbelieve Holmes and Meenach's emphatic testimony that it was not. Moreover, the fact that the talking points prepared for this meeting by DuPont included reference to cost savings as one advantage of the contracting out, and further, separately referenced overtime and training costs concerns, further leads me to lean toward believing Irvin, and disbelieving Meenach and Holmes on this point. Costs were an issue for DuPont in its preparation for this meeting, and DuPont evinced an intent to be prepared to discuss that issue with the unions. Given this, it is plausible that it was mentioned, as testified to by Irvin, and I credit his account.

F. The ARWI Files an Unfair Labor Practice Charge; a Complaint is Made Through the DuPont Hotline

Two days after the meeting, on June 21, 2018, the Union filed an unfair labor practice charge over DuPont's refusal to bargain over the decision to contract out the ERT.

DuPont maintains a hotline which employees can call to register complaints. In response to a complaint that a new manager was "offering jobs to his old partners that he used to work with in Chesterfield," Holmes responded on July 11, in a message that appears to assume that the new manager in question is Lukhard. Holmes' message acknowledges that the subcontracting "will end many hours of overtime" for employees "resulting in a loss of additional income":

> The Spruance Site leadership has been looking at ways to improve productivity, yields, people capability, and various other ways to become more cost-effective. Recently, the site management informed the Ampthill Rayon Workers, Inc. (ARWI) and International Brother of Electrical Workers (IBEW) that the decision has been made to contract out the site Emergency Response Services. This decision was approved by Rose Lee, VP of Safety and Construction, and LG Tackett, Global Operations Manager of Safety and Construction. The site understands that this decision is a very emotional issue for those employees who volunteer to support the Spruance Emergency Response Services, as it will end many hours of overtime resulting in a loss of additional income. The third-party contract is with FDM Safety Services, a professional firefighting organization that has provided services for the DuPont Spruance site in the past, and prior to Emergency Response Services Chief Robert Lukhard's employment with DuPont.

G. July 20 Meeting; July 25 Follow-Up Letter from Holmes

Irvin and the rest of the executive committee were invited to another meeting about the ERT with management on July 20. Holmes sent an email listing the subject of the meeting as "Emergency Response Effects Negotiations." Holmes, Jacobs, and Ida Harris attended for management. (Harris was identified in the record as a DuPont HR Consultant as of April 13, 2017. See, GC Exh. 6 at 3.) Holmes testified that one purpose of the meeting was to supply the Union with the cost information that had been requested by the Union at the June 19 meeting. When Irvin arrived at the meeting, he noticed that not only was the ARWI's executive committee there, but also the IBEW's bargaining committee.

The meeting began with a safety contact and then Holmes announced that he had called the meeting to start the effects bargaining over the subcontracting. Early in the meeting, Meechan provided the Union with information about the overtime and training costs for 2017 for the ERT program. Holmes testified that it "equaled up to about $2 million bucks." Meechan testified that the overtime cost $1.5 million, the training costs were $600,000, for a total of $2.1 million. Meechan testified that no information was provided about the cost of the new contracted-out emergency response program.

Irvin asked Holmes if he was bargaining. Holmes said no. Ms. Jacobs said, "we are here to bargain the effects of our decision." Irvin said that the Union was there to bargain over the ERT. According to Holmes, Irvin said something to the effect that "at this point . . . I'm not bargaining anything out of a labor charge." Jacobs reiterated that "we will only bargain the effects." The Union took a caucus and when they returned Irvin and his team made clear they would not do the effects bargaining, they had a "labor charge" and walked out. At the hearing, Irvin testified that the principal reason for walking out was the Union's view that DuPont needed to engage in decisional bargaining and it had made clear that it would not. As they were walking out, Holmes asked the IBEW business agent what its position was. The IBEW representative said, "same as the ARWI." That was the end of the meeting.

By letter dated July 25, Holmes wrote the ARWI Executive Committee, stating:

> As you know, we have offered to negotiate with you about this matter. On July 20, 2018, you refused to negotiate because you had filed an unfair labor practice charge. In the absence of your input we are forced to proceed without your input. Naturally, we are happy to meet and negotiate this issue at any time.

Holmes' letter went on to provide a July and August schedule for the training of the FDM contractors on and off site, and using the ERT fire trucks, hazmat, and other equipment. Finally, the letter confirmed that a full transition to the ERT contractor was scheduled for September 1, 2018. Evidence suggested that DuPont paid approximately $60-75,000 during July and August 2018, when it had the FDM employees in place and training but before it ended the DuPont ERT program on September 1.

By email dated August 10, 2018, Yanoschak sent an email to Lukhard, and other DuPont officials—that she told them to keep confidential—setting forth the "ongoing annual savings and not just 1-time" savings associated with the subcontracting. Based on 2017, Yanoschak's chart estimated annual overtime savings of $732,936 by using the contractor.

Notably, by August 20, a DuPont manager was openly expressing concern to other managers as to whether the contracting out should be justified in communications to employees as being based on cost advantages, fearing that such an admission would "create issues" with the unfair labor practice charge pending against DuPont. In an August 20, email exchange devoted to reviewing drafts of communications to go to the plant about the changeover to FDM, Labor Consultant Sparks stated that

> I am still on the fence on including 'reduced cost of service.' I am thinking that once we have the final version, I would like to run this by our legal team as there is a current ULP on this issue and we want to make sure we are not creating issues.
>
> In the email exchange, Yanoschak endorsed Sparks' "updates to my wording."

H. September 1 Implementation of Subcontracting

The subcontracting was implemented as scheduled on September 1. There is no evidence (or claim) that the day-to-day work of the facility—the production, the maintenance work, the types of products produced—changed in conjunction with the contracting out of ERT.

As far as emergency services, they have operated as planned, with the contracted employees working 24-hour shifts. With the exception of a building to house the contracted employees during their 24-hour shifts, there is no new facility or building from which the FDM employees service the Spruance plant. They are onsite and respond as needed to calls relating to emergency services. Instead of having six personnel for every shift as there were under the employee-staffed model, there are now four during any shift, and the four are now cross-trained as EMTs and firefighters. The FDM contractors continue to rely on Chesterfield County for assistance in the "few times/year" when they need to offensively enter an ILDH or handle a situation beyond the FDM capability.

Lukhard testified that with the FDM contractors performing the emergency services it is "totally different because they are dedicated emergency services members," whose entire work is about preparing for, training, and being involved in emergency services. Lukhard cited that response time had dropped, with all ERT employees coming from a central location, but on cross examination he admitted that the advantage of all ERT members coming from a central location would vary depending on the part of the plant to which they were responding.

Lukhard testified that there is an ongoing $10–11 million investment by DuPont to upgrade the Honeywell fire alarm and emergency communication systems over the next four years. He also testified that that "[w]e have a long-range plan to get every building on the site to have sprinkler protection," a cost he estimated to be a $10 million investment over the next 5–7 years. Lukhard also testified that DuPont was investing directly in emergency services by investing in new extrication equipment, upgraded hazardous-chemical monitoring equipment, as well as spending approximately $800,000 on the building to provide onsite living quarters for the contracted emergency services employees.[11]

I note that none of these expenditures was documented in any fashion and, with the exception of the accommodations for the new contractors, none of this was shown or even claimed to be in any way dependent on, tied to, or linked to the contracting out.

ANALYSIS

The complaint alleges (GC Exh. 1(c) at ¶¶ 6 &10) that since about June 18, 2018, and thereafter, the Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain over the emergency services work. Further, the complaint alleges (GC Exh. 1(c) at ¶¶ 7&10) that about September 1, 2018, the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting the emergency services work without providing the Union an opportunity to bargain.

A. The Failure and Refusal to Bargain Over Emergency Services

1. The duty to bargain over the emergency services subcontracting decision

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Under Section 8(d) of the Act mandatory subjects of bargaining include "wages, hours, and other terms and conditions of employment." As the Supreme Court explained in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210–211 (1964), the contracting out of unit work

> is well within the literal meaning of the phrase "terms and conditions of employment" . . . The inclusion of "contracting out" within the statutory scope of collective bargaining also seems well designed to effectuate the purposes of the National Labor Relations Act. One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42–43 [(1937)]. To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.

Thus, in *Fibreboard*, the Supreme Court held that an employer's "replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" is a mandatory subject of bargaining. Id. at 215.

However, the Court in *Fibreboard* recognized that not every form of arrangement called contracting out or subcontracting necessarily falls within the ambit of the duty to bargain. 379 U.S. at 215. In his influential concurrence in *Fibreboard*, Justice Stewart distinguished the subcontracting at issue in *Fibreboard*, where employees are replaced with those of an independent contractor to do the same work, from other types of management decisions "concerning the commitment of investment capital and the basic scope of the enterprise" that "lie at the core of entrepreneurial control." 379 U.S. at 223. This latter type of decision, for which bargaining is not required, was discussed by the Supreme Court in *First National Maintenance*, 452 U.S. 666 (1981), where the Court concluded that a management decision

[11] I note that Lukhard's figure of $800,000 for the accommodations is undocumented and far in excess of the March 15 and April 24 PowerPoint reports which anticipated a one-time cost of $175,000—$200,000 to provide living quarters for FDM staff. (GC Exh. 12 at 3; GC Exh. 13 at 2.)

involving "a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all," and the type of decision over which an employer has no duty to bargain. Id. at 677, 686–688.

Consistent with *Fibreboard* and *First National Maintenance*, the Board has long held that a decision to subcontract the work of employees that is unaccompanied by any substantial commitment of capital or change in the scope of the business is not a decision at "the core of entrepreneurial control" and, therefore, is a mandatory subject of bargaining. *Torrington Industries*, 307 NLRB 809 (1992); *Spurlino Materials, Inc.*, 353 NLRB 1198, 1218 (2009) ("Subcontracting of bargaining unit work that does not constitute a change in the scope, nature, or direction of the enterprise, but only substitution of one group of workers for another to perform the same work is clearly a mandatory subject of bargaining"), reaffirmed 355 NLRB 409 (2010); *Sociedad Espanola de Auxilio Mutuo y Beneficia de P.R.*, 342 NLRB 458, 458 (2004), enfd. 414 F.3d 158 (1st Cir. 2005), enfd. 414 F.3d 158 (1st Cir. 2005).

In this case, the Spruance plant emergency services work had for many decades been performed by bargaining unit (and some non-bargaining unit) DuPont employees. They were paid for the work and, indeed, it was a major source of overtime for those employees who sought, trained, and qualified for ERT positions. As DuPont recognized in its internal discussion and documents, this overtime was a significant cost to DuPont—over $1.6 million in 2017—and along with savings in training costs, the subcontracting was variously anticipated by DuPont to save it $732,000 to $1 million annually. (See, GC Exh. 13 at 3; GC Exh. 12 at 3; GC Exh. 17 at 2 (item 8); GC Exh. 21 at 3). As a result of DuPont's decision to subcontract, this work and the training for it would no longer available to unit employees. However, the work continued to be done, onsite at the Respondent's facility, utilizing the same equipment and resources, and even remaining under the control and direction of the DuPont. By the contract with FDM, Chief Lukhard directly supervised the contract shift commanders and could assign work to the remaining FDM employees. Lukhard even wrote the job descriptions for the contract employees and had input into their hiring. Moreover, DuPont's stated plan was to subsequently replace the contracted-FDM shift commanders with "exempt" DuPont employees. Finally, it is notable that even after the subcontracting, DuPont—now using a contractor instead of employees—continued to ensure and take responsibility for emergency services throughout the entire Spruance plant (everywhere "within the fence line") including the separately operated Zytel and Mylar plants, and even at the utilities operation operated onsite by a company named Veolia since February 2018. Indeed, in January 2019, DuPont entered into an agreement with Veolia to continue to provide emergency services to utilities operations for the next 18 years. This is hardly a case, as Holmes tried to convince the Union, of DuPont "not want[ing] to be in the fire business."

As of September 1, 2018, the contractor's employees performed the same emergency services work that the DuPont employees used to perform. The work was not eliminated or moved from the Spruance plant. Although it could have—no law or regulation requires that DuPont maintain an onsite emergency services—DuPont did not cease providing for emergency services at the Spruance plant. It did not shut down a segment of the Spruance plant operations. Rather it continued to provide for emergency services with the use of contract work force under its control. The work and responsibilities were transferred to a contractor that the Respondent hired to do the emergency services work. I conclude that this closely resembles "*Fibreboard* subcontracting" and the decision is subject to the duty to bargain.

There are differences, to be sure, between the working conditions of the new contractor employees and the unit employees—there are fewer new contractors per shift, they work longer shifts, and their work is exclusively emergency-services related work—they do not perform the emergency services work as an addition to a production or maintenance job. But these changes in work—all changes, of course, that by themselves fall within the core of the duty to bargain, and all changes decided upon, adopted, and maintained by DuPont and its Chief Lukhard—do not in any way change the fundamental work or duties that the contractor employees are performing: they are assigned and are performing the emergency services work, at the same location, in the same manner, and under the same plant conditions. *Fibreboard* refers to *similar* conditions, not identical ones, and DuPont has not fundamentally eliminated or changed anything.

In its brief, DuPont stresses that no unit employees lost their jobs—only overtime opportunities—on account of the contracting out of the ERT. However, the overtime losses are significant. As Holmes admitted in his July 11 response to the "hotline" inquiry, DuPont

> understands that this decision is a very emotional issue for those employees who volunteer to support the Spruance Emergency Response Services, as it will end many hours of overtime resulting in a loss of additional income.

In any event, even in the absence of immediate impact on unit employees' hours of work the Board still requires bargaining over otherwise bargainable subcontracted work. *Mi Pueblo Foods*, 360 NLRB 1097, 1097–1098 (2014) ("bargaining is not excused simply because no driver was laid off or experienced a significant negative impact on his employment . . . . [T]he Board has held that when bargaining unit work is assigned to outside contractors rather than bargaining unit employees, the bargaining unit is adversely affected"); *Bob's Tire Co.*, 368 NLRB No. 33, slip op. at 6 (2019) (loss of opportunities for increased overtime adversely affects unit); *Overnite Transportation*, 330 NLRB 1275, 1276 (2000); *Acme Die Casting*, 315 NLRB 202 fn. 1 (1994).

Contrary to the claims of the Respondent, there is simply nothing about the decision that constitutes "a change in the scope and direction of the enterprise" (*First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981)) or "lie[s] at the core of entrepreneurial control." *Fibreboard*, 379 U.S. at 223 (Stewart, J. concurring).

First of all, as referenced above, DuPont did not eliminate the function of emergency services from that basket of services, production, and support, that is performed as part of the operation at the plant. The work was not relocated to another part of the country or a different plant. Another company has not come in and paid DuPont to use DuPont's emergency equipment, its land, and utilities. It is not even the case that the emergency services

work is now performed by a new entity located elsewhere that only comes to the Spruance plant episodically to handle emergencies as they arise. Rather, DuPont now provides the emergency services with a contracted 12-person fulltime crew—which remains under DuPont' Fire Chief Lukhard's ultimate control—rather than with a group of part-time DuPont employees. This is *Fibreboard* subcontracting.

Equally to the point, the Spruance plant's products, production processes, and business are unaffected by this change in the employment arrangements for supplying emergency services. Emergency services is necessary and important work for a synthetics production plant, but it is tertiary to the plant's nature and purpose. The change in the employment arrangement for the individuals performing emergency services did not impinge on the nature, purpose, or scope of the enterprise. *Mi Pueblo Foods*, 360 NLRB at 1098 ("The Respondent remained in the business of warehousing and delivering products, and the Respondent's decision to change the manner in which products of one of its suppliers reached most of its stores did not involve matters at the core of its enterprise"); *Power, Inc.*, 311 NLRB 599, 599 (1993) (finding duty to bargain over subcontracting of operation and maintenance of rock trucks and graders and drilling operations, in part, because "the Respondent continued to mine, process, and sell coal; it did not substantially change its production process"), enfd. 40 F.3d 409 (D.C. Cir. 1994).[12]

Indeed, in this regard, the Board has specifically rejected employer efforts to narrowly characterize the business as *the subcontracted work* in an opportunistic effort to claim that the subcontracting at issue changed the scope or direction of the business.

For example, in *Bob's Big Boy*, 264 NLRB 1369 (1982), an administrative law judge found that an employer that prepared foodstuffs for individual restaurants had changed the nature and direction of its business—and therefore did not have to bargain about the decision—by contracting out the preparation of shrimp. The Board reversed, in reasoning worth setting out here:

> In our view, a proper analysis of this case begins with an accurate characterization of Respondent's business. While it is literally correct to say that Respondent was in the shrimp processing business, we find that to be too narrow a description of Respondent's business. More accurately, Respondent is in the business of providing prepared foodstuffs to its individual restaurants. Thus, shrimp preparation existed as a component part of Respondent's business along with the preparation of meats, salad dressing, produce, and bakery goods and did not constitute a separate and distinct business enterprise. With this more accurate definition of Respondent's business before us, we can engage in more meaningful analysis of whether Respondent's action is suitable to collective bargaining or whether it is a decision that goes to the very core of entrepreneurial control.
>
> Our dissenting colleagues' characterization of Respondent's business, like that of the Administrative Law Judge, artificially fragments Respondent's enterprise and ignores the fundamental purpose of its operation. Respondent provides prepared foods to its retail restaurants. It did so before contracting with Fishking to prepare breaded shrimp, and it does so after that agreement. The issue presented is thus readily distinguishable from *First National Maintenance* and from other cases involving the termination of an independent portion of a respondent's operations. In *First National* respondent totally ceased servicing the nursing home where the represented employees in question had been employed. Here Respondent not only continues to service its restaurants, but it continues to supply them with prepared shrimp.

Bob's Big Boy, 264 NLRB at 1370–1371 & fn. 12 (footnote citation omitted).

In our case, DuPont's contracting out does not even rise to the level of the shrimp processing in *Bob's Big Boy*, which, at least, altered a component of the foodstuffs product prepared and provided to the employer's customers. It does not rise to the level of the change in distribution of products in *Mi Pueblo Foods*, which affected the delivery of products. It does not rise even to the level of the job consolidations and reassignments in *Holmes & Narver*, that changed the work demands on motor pool mechanics. DuPont's subcontracting of the duties of emergency services leaves the production, scope, and function of the business undisturbed.

That the Spruance plant's emergency services work is not a primary production function, *and* that the emergency services continues to be performed onsite by a contractor, leaves the Respondent with only inapposite cases to cite. For instance, the Respondent cites *Arrow Automotive Industries v. NLRB*, 853 F.2d 223 (4th Cir. 1988). However, that case involved an auto/truck parts remanufacturer and distributer that closed its Hudson, Massachusetts plant. The work went to its South Carolina facility. The court found that such a plant closure involved a change in the scope and direction of the enterprise, and the plant closure decision was not required to be bargained. But DuPont has not closed the Spruance plant—or any part of it. Its emergency services work has been re-designated to a contractor working onsite, the work has not been relocated.

DuPont also cites *Gar Wood-Detroit Truck Equipment*, 274 NLRB 113 (1985), but that case involved an employer's decision—necessitated by an existential need to "reduce its overhead costs across-the-board so as to be able to remain in business"—to exit the business of mounting and servicing equipment on trucks leaving only its business of selling truck parts. The employer in *Gar Wood-Detroit* subcontracted the mounting and servicing work, leased its facilities and equipment to the new subcontractors who began paying a portion of the employer's rent and utilities. The employer retained no right of control over the subcontractor's employees. The Board relied on evidence showing that this decision was made as part of a decision "to get out of the garage business" and operate as a "parts distribution" business," which the Board found to be a fundamental shift in the

[12] See also, *Holmes & Narver*, 309 NLRB 146 (1992) (finding that an employer's internal reorganization of jobs for its mechanics in its motor pool to give them additional duties required bargaining, because the decision did not entail abandoning a line of business, ceasing business with a particular customer, or significantly altering the scope of the business; rather, the employer performed the same work with fewer employees, and its decision was "almost exclusively 'an aspect of the relationship' between employer and employee" amenable to bargaining).

nature and direction of the employer's business. In sharp contrast, DuPont has not altered its Spruance plant business at all—its operations and production remain unchanged. Indeed, it has not even gotten out of the emergency services—as the FDM employees continue to report through their chain of command to Lukhard, DuPont has plans to replace the FDM shift commanders with DuPont exempt employees, and FDM does not rent or compensate DuPont for use of DuPont's equipment or land. DuPont has not gone out of the emergency services business. Rather, it has hired a contractor to provide employees to perform the emergency services previously performed by the DuPont employees.

DuPont also contends that its motives for the subcontracting exempt the decision from collective-bargaining obligations under the Act. However, labor costs, specifically overtime and training labor costs, were manifestly a factor in the decision to contract out. As noted, above, the actual decision-making process of upper management about the subcontracting is opaque. What we have demonstrates that the anticipated savings in overtime and training costs were significant factors, repeatedly emphasized in the explanations for the contracting out.[13]

At the hearing, the substantial evidence of labor cost motivation in the decision to subcontract was met with the insistence of the Respondent's witnesses that cost savings had nothing to do with the matter.

Unfortunately, it appears, as the General Counsel points out, that once the Union filed its unfair labor practice in June 2018, the Respondent began to omit the cost savings rationale from its discussions of the contracting out. For instance, Lukhard's post-implementation October 24, 2018 PowerPoint—very unlike the confidential March and April 2018 PowerPoints, which each devoted a whole slide to showing the anticipated $1 million annual savings—omitted any reference to cost savings. Lukhard's October 2018 presentation was for public—or perhaps, NLRB—consumption. Behind the scenes, the costs savings to be netted from the contracting of the ERT remained important to DuPont. Yanoschak's August 10, 2018 email was devoted to the subject—projecting annual overtime and training cost savings of over $700,000, but warning that the matter should be kept quiet:

> Please find attached the spreadsheet containing the savings associated with the change to contract Emergency Services. Please maintain the confidentiality of this document and do not forward or provide to anyone other than the person that needs to calculate IRR. These are ongoing annual savings and not just 1-time.[14]

Why the secrecy, at this late date less than 3 weeks before implementation? A clue is found in Sparks' August 20 email to other top managers, part of a group email crafting the wording of a bulletin about the subcontracting to be distributed to the work force. In the email Sparks expressed concern, endorsed by Yanoschak, that the bulletin should not mention "reduced costs of service" for fear of "creating issues" for the "current ULP on this issue."[15]

At the hearing, the Respondent's witnesses only added to this odor of disingenuity. Holmes testified that when he announced the subcontracting to the Union, he had no knowledge of any cost savings associated with the subcontracting, and, therefore could not have addressed the issue of costs. But this was shown to be, and is found to be, unbelievable. In the days and also months before the meeting with the unions, Holmes was privy to DuPont documents that highlighted the anticipated overtime and training cost savings of a million dollars annually to be gleaned from the subcontracting. Meenach engaged in the same testimonial evasion, going so far as to nonresponsively volunteer, in response to a question about what Irvin said at the June 19 meeting, that "So we made it clear that it wasn't about cost. It was about making sure we had the right staffing levels and the right safety at the plant." This is all very suspect in the context of a record where DuPont appears to be purposefully trying to shape its unfair labor practice defense by minimizing or eliminating a labor-cost rationale for the subcontracting decision.

In short, the plethora of evidence demonstrating the importance of the overtime and training cost savings to the contracting out decision is only heightened by DuPont's effort to hide it and deny it. And DuPont's motive seems clear. DuPont undoubtedly understands that the Supreme Court has "emphasized that a desire to reduce labor costs [is] considered a matter 'peculiarly suitable for resolution with the collective bargaining framework.'" *First National Maintenance*, 452 U.S. at 680, quoting *Fibreboard*, 379 U.S. at 204.[16]

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[13] See, March 15, and April 24, PowerPoint demonstrations highlighting the anticipated $1 million annual savings in overtime and training costs; June 18 email from Yanoschak "$1.7MM overtime costs (staffing and confined space support); Training Costs $450M. Cost of the contract services $ 1.1MM ($1MM Savings annually)"; "confidential" August 10 email with chart showing "ongoing annual savings and not just 1-time" savings associated with the contracting; April 27, Tackett approval of "cost sourcing variance request" citing as justification for subcontracting that the "Site will recognize a significant cost savings in overtime as a result of this effort"; June 14 email citing "Reduced cost of services" as benefit and more specifically identifying "Significant reduction in overtime, training, and equipment and apparatus cost."

[14] IRR is a common accounting abbreviation for internal rate of return, a metric used to estimate profitability.

[15] Sparks wrote:

> I am still on the fence on including 'reduced cost of service.' I am thinking that once we have the final version, I would like to run this by our legal team as there is a current ULP on this issue and we want to make sure we are not creating issues.

The version of the bulletin that made it into the record (see, GC Exh. 18 at 4), which, Yanoschak wrote, reflected "Mary Anne['s] . . . updates to my wording that I like," did not reference "reduced cost of service" or make any reference to the cost savings that Yanoschak was predicting.

[16] I note that the evident role of overtime labor costs does not make applicable the burden-shifting test articulated in *Dubuque Packing Co.*, 303 NLRB 386 (1991), enfd. in relevant part, 1 F.3d 24 (D.C. Cir. 1993). Given that the unilateral work change at issue does not involve relocated work, the General Counsel and the Respondent's arguments about how the dispute would be resolved under *Dubuque Packing* are inapposite. The Board has never applied *Dubuque Packing* to decisions, such as that here, that manifestly are not work relocation decisions. Rather, the Board "has made clear, however, that that particular burden-shifting test was devised for determining the nature of relocation decisions, and we did not purport to extend it to other types of management decisions that affect employees." *Torrington*, 307 NLRB 809, 810 (1992), citing *Dubuque Packing*, 303 NLRB 386, 388–390 (1991). See also, *Somerset*

In addition to the direct overtime and training cost savings that animated the Respondent's subcontracting decision, it is notable that Lukhard's lengthy testimony about his interest in the contracting out—intended by the Respondent to act as a stand in for DuPont upper management's decision making process—also supports the finding that the contacting out of the ERT was a mandatory subject of bargaining.

Thus, Lukhard emphasized in his testimony that the subcontracting was motivated by problems DuPont encountered in finding sufficient able unit employees necessary to staff and lead the emergency services. The Board has squarely held that this rationale for subcontracting places the subcontracting decision within the ambit of the duty to bargain. *Sociedad Espanola de Auxilio Mutuo y Beneficia de P.R.*, 342 NLRB 458, 468–469 (2004) (employer claim that subcontracting "prompted by its inability to recruit and hire the X-ray technicians and respiratory therapists needed to meet its staffing requirements" demonstrates that decision was mandatory subject of bargaining), enfd. 414 F.3d 158 (1st Cir. 2005)**;** *Furniture Rentors of America*, 311 NLRB 749, 750 (1993) (subcontracting motivated by dissatisfaction with employees' conduct and performance is bargainable), enf. denied in relevant part, 36 F.3d 1240 (3d Cir. 1994).

Indeed, these types of concerns are themselves, indirect labor costs covered by the duty to bargain. See generally *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991) (labor costs include both direct and indirect costs of labor), enfd. 1 F.3d 24 (D.C. Cir. 1993), cert. denied 511 U.S. 1138 (1994). See also *Electrical Workers Local 11*, 217 NLRB 397, 400 (1975) (labor costs included man-hours lost training employees and familiarizing them with employer's equipment).

Lukhard also stressed the dangerous mix of chemicals and processes at play in the plant as a basis for his desire to subcontract, a motive that the Respondent characterizes as a safety and environmental concern. However, this motive, which—as it is completely absent from any contemporaneous or even post-implementation documentation touting the benefits or rationale for the contracting out—appears to be contrived for litigation. At the hearing, Lukhard was led through a lengthy but rote account of the many dangerous chemicals onsite; for each chemical he endorsed a question posed by counsel as to whether that hazard "inform[ed]" or "influenc[ed]" "your decision to outsource the ERT." (See, Tr. at 367, 372, 371, 379, 392, 393, 398, 399, 407).

The Respondent urges its safety concerns as a predicate for its claim that they render the decision to subcontract the ERT nonbargainable in accord with *Oklahoma Fixture*, 314 NLRB 958 (1994). That case, the Board found, "present[ed] the unusual situation" where the credited testimony of the employer's vice-president who made the subcontracting decision established that the decision "was based on core entrepreneurial concerns outside the scope of mandatory bargaining." Id. at 960. More specifically, in *Oklahoma Fixture*, an employer that manufactured display cases for department stores—primarily for one customer, Dillard's—brought electrical wiring work inhouse after contracting it out for 5 years. One year later, the credited testimony of the employer's Vice-President Cavins was that he decided once again to subcontract the electrical work because he was concerned about legal liability, the risk of losing Dillard's as a customer and of losing virtually all of the Respondent's revenue in the event of electrical damage, that he did not feel competent to oversee the wiring work, and that he wanted a subcontractor who was insured to do the work. Id. at 958, 960. Relying on the fact that "[t]he judge credited the testimony of Vice President Mark Cavins that he was genuinely concerned about legal liability and the risk of losing Dillard's business in the event of electrical damage caused by the Respondent's employees," and recognizing that that "'[l]abor costs,' even in the broad sense of the term employed by the Board, were not a factor in the decision," the Board found that the employer's subcontracting "involved considerations of corporate strategy fundamental to preservation of the enterprise," and therefore was outside the scope of the duty to bargain.

DuPont's decision to contract out the ERT here cannot be molded into a "core entrepreneurial" endeavor that was part of a "corporate strategy fundamental to preservation of the enterprise," as was the case in *Oklahoma Fixture*.

For one thing, and dispositively, unlike the decision in *Oklahoma Fixture*, the decision to subcontract here did involve labor costs, as discussed above, both in terms of direct overtime cost savings and indirect costs of staffing and training.

For another, unlike in *Oklahoma Fixture*, I do not credit the claim that safety concerns "fundamental to the preservation of the enterprise" motivated this subcontracting. In this regard, I do not put much stock on Lukhard's rote and led testimony on this score. The hazards are real, but the suggestion at trial a year later that it contributed to the decision to contract out the ERT (vaguely described as "informing" or "influencing" the decision) is self-serving, uncorroborated, and unverified. It lacks credibility, as safety is unmentioned in any of the documentation about the decision created by the Respondent before or after the subcontracting.[17] But even assuming, arguendo, safety was an honest concern of Lukhard's, there is zero evidence that he presented or expressed this concern to others above him or that it figured in any way into DuPont's decision to subcontract. There was absolutely nothing new about the hazards and chemicals at the Spruance plant. They had all been there as long as anyone who testified could remember. If the safety of the employee ERT was a concern to Lukhard, who arrived in July 2017, there is no evidence that anyone else at DuPont, including the more senior managers to whom Lukhard reported and who were involved in the decision to subcontract the ERT, shared the view that the ERT program compromised safety. The credibility of the claim is not enhanced by the fact that its acceptance requires accepting

Valley Rehabilitation & Nursing Center, 364 NLRB No. 43, slip op. at 14 & 4 (2016) (judge rejects application of *Dubuque Packing* analysis where "there is no evidence that bargaining unit work was geographically relocated as in *Dubuque Packing*"; Board holds that "if defenses the Respondent raises were cognizable here, we affirm the judge's reasons for rejecting them on the merits"); *Power, Inc.*, 311 NLRB 599, 599 (1993) ("the *Dubuque* test does not apply in cases factually similar to *Fibreboard*"), enfd. 40 F3d 409 (D.C. Cir. 1994).

[17] Such "post-hoc" justifications are typically found to be pretextual. See, e.g., *Approved Electric Corp.*, 356 NLRB 238, 239 (2010) ("The Board commonly recognizes such shifting rationales as evidence that an employer's proffered reasons for discharging an employee are pretextual") (citing *City Stationery, Inc.*, 340 NLRB 523, 526 (2003)).

that safety concerns that had comfortably existed with an employee ERT for decades and decades, suddenly are perceived by DuPont as an existential threat to the enterprise. There is simply no evidence to support this fantastic claim, which is wholly undocumented as a concern by DuPont at the time the decision was being made.

Finally, even assuming, wrongly and without credible evidence that safety was one of the concerns that prompted the subcontracting, this negates not at all the amply documented concerns with overtime costs and staffing issues that motivated the subcontracting. Those concerns are bargainable reasons for the subcontracting and the (late) addition of professed safety concerns does not retroactively render the decision nonbargainable.

For all of these reasons, *Oklahoma Fixture* is inapposite to the situation at bar here.

DuPont's remaining contention is that the decision to contract out the emergency services was part of a decision to make capital expenditures or liquidate assets. This does not follow from the evidence. While the Respondent makes much of Lukhard's claims that DuPont is investing in infrastructure related to emergency services over the next 5 or 10 years—wholly undocumented claims, I note—none of it is linked in any way to the decision to subcontract the emergency services. Thus, upgraded communications systems, an upgraded fire alarm system, an upgraded sprinkler system, all of this vaguely discussed as being completed in 4 years, or 5 years, or more, are the type of improvements that could be made with or without contracting out of the ERT. There is no evidence that any assets are being sold to the contractor or otherwise given up. Notably, and significantly, none of DuPont's internal or external communications about the subcontracting decision associate or even mention in any way the alleged capital expenditures and infrastructure improvements. In this regard, apropos is the Board's explanation for rejecting the employer's "capital expenditure" defense to the duty to bargain subcontracting in *Bob's Big Boy Family Restaurants*, 264 NLRB at 1371:

> We note that, when the subcontracting arrangement became operative, Respondent was not required to engage in any substantial capital restructuring or investment. . . . In short, no immediate restructuring of capital was necessitated by the decision to subcontract and the subsequent capital transactions, while not de minimis, occurred at a leisurely pace with Respondent retaining possession of the basic facility and certain of the equipment used in shrimp processing. Accordingly, the capital transactions undertaken pursuant to the decision to subcontract are not, in our view, substantial enough to remove the decision from the scope of Respondent's mandatory bargaining obligation.

This is even more true here, where the vague assertions of capital expenditures are not driven or linked in any demonstrated way by the subcontracting or associated with it.[18]

After decades of having employees perform the emergency services work, DuPont decided it wanted to hire a contractor to perform the same work. It need not be said, but to avoid any risk of misreading I will say it: nothing in this record suggests that DuPont's desire to contract out the ERT was borne of illegal motive; nothing in this record shows that DuPont was wrong to want to contract out the ERT. Indeed, it may well be that the Respondent's desire to contract out the work makes eminent sense for the operation and, perhaps, even for the employees. And it may be that after unsuccessful but good-faith bargaining, the Respondent would have been able to implement the subcontracting. But the subcontracting decision is grist that the Act requires the Union be given the opportunity to put through the mill of the bargaining process.

2. Contractual and waiver defenses

DuPont contends (R. Br. at 29–30) that it was excused from the duty to bargain over the emergency services subcontracting based on a "contract coverage" defense. In *MV Transportation, Inc.*, 368 NLRB No. 66 (2019) the Board adopted the contract coverage standard to analyze contractual defenses to refusal to bargain allegations. Under this standard,

> the Board will examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. . . . In other words, the Board will honor the parties' agreement, and in each case, it will be governed by the plain terms of the agreement.

MV Transportation, supra at slip op. 2.

Essentially, under the contract coverage standard, "where . . . the agreement will have authorized the employer to make the disputed change unilaterally . . . the employer will not have violated Section 8(a)5)." *MV Transportation*, supra at 11.

> "On the other hand," the Board explained in *MV Transportation*:
>
> if the agreement does not cover the employer's disputed act, and that act has materially, substantially and significantly changed a term or condition of employment constituting a mandatory subject of bargaining, the employer will have violated Section 8(a)(5) and (1) unless it demonstrates that the union clearly and unmistakably waived its right to bargain over the change or that its unilateral action was privileged for some other reason. Thus, under the contract coverage test we adopt today, the Board will first review the plain language of the parties' collective-bargaining agreement, applying ordinary principles of contract interpretation, and then, if it is determined that the disputed act does not come within the compass or scope of a contract provision that grants the employer the right to act unilaterally, the analysis is one of waiver.

MV Transportation, supra at slip op. 2 (footnotes omitted)

Given the labor agreements between the ARWI and DuPont (both the 2015 Agreement and the 2018 Agreement), the contract-coverage defense is meritless in this case. Indeed, in its

[18] I note but dismiss the Respondent's further contention that the subcontracting of the ERT work was linked or "attributable to" a significant corporate restructuring that DuPont effectuated worldwide in the spring of 2019 (R. Br. at 15, ¶50; R. Exh. 50). There is zero evidence that the contracting out of ERT in 2018, was in any manner caused by, attributable to, or related to this world-wide corporate restructuring. Whatever changes were roiling the corporate and financial waters at DuPont worldwide, at Spruance the operations were—by all evidence—unaffected.

brief, DuPont avoids reference to a provision of the 2018 agreement that specifically treats with limitations on its right to contract out.

The provisions that DuPont cites in support of its "contract coverage" defense are so far removed from the dispute at hand that DuPont has trouble explaining their application. DuPont points to—and points only to—two sections of the labor agreements in support of its argument; two sections from the "Miscellaneous" article of the agreements (secs. 2 & 9 of art. IX of the 2015 Agreement, restated as secs. 2 and 8 of art. IX of the 2018 Agreement). These provisions state:

> Section 2. Recognizing the technical nature of the COMPANY'S Operations, the UNION acknowledges the COMPANY'S right to employ and retain individuals with technical training in such capacity as Management deems desirable. However, any such employee (student operator, etc.) being trained in the Plant areas shall not prevent an employee not technically trained from gaining a promotion in such capacity as he normally would receive under Article VIII. Such technically trained employee shall take his normal seniority position if he is removed from his special position.
>
> * * * *
>
> Section 9 [Section 8 in the 2018 Agreement]. Supervision will not perform production or maintenance work ordinarily done by employees covered by this Agreement, except they may perform such work in the interest of safety or in the preservation of COMPANY property or in the performance of duties such as Instruction, training, work during emergencies or for the purpose of investigation inspection, experimentation and obtaining information when production or equipment difficulties are encountered.

As to Section 2, DuPont does not even venture a claim as to what that has to do with a purported unilateral right to contract out the ERT. As to Sections 8 & 9, the contracting out at issue does not involve the use of supervisors in place of unit employees, so the relevance of the provision is not apparent, and, in any event, DuPont's claim that its contracting out of the ERT was undertaken in the interest of safety, and as an emergency, and thus permitted by this section, has been rejected as a contrivance.[19]

These contractual provisions cited by DuPont do not even remotely suggest that the unilateral contracting out of the ERT was "with in the compass or scope of contractual language granting the employer the right to act unilaterally." *MV Transportation*, supra.

Most tellingly with regard to its "contract-coverage" defense, DuPont ignores—it does not mention—that the 2018 Agreement—which was effective September 1, the day of the contracting out of the emergency services, contains an Addendum E ("Contract of Work (COW) Procedure) that establishes a bargaining process for the contracting out of work. This provision states that:

> Since all contracted work requires prior bargaining, this procedure describes the process to engage appropriate site resources to review these jobs and approve the use contracted resources.

Appendix A to Addendum E lists jobs that "have been blanket bargained with the Unions and do not have to go through the Contracting of Work process," but emergency services (or anything resembling it) is not listed.

One of the stated goals of the Board in adopting the "contract-coverage" standard was "ensuring that *all* provisions of the parties' agreement are given effect." *MV Transportation*, supra at slip op. 9 (Board's emphasis). It is not lost on me that DuPont's contention that it has a contractually-based right to unilaterally contract the ERT fails to treat with—or even direct the Board's attention to—a provision of the current agreement—in effect from the day the subcontracting was implemented—that appears to affirmatively refute its contractual defense.

The Respondent also argues that the Union has waived the right to bargain over contracting out of the emergency services work. As set forth in *MV Transportation*,

> if the contract coverage standard is not met, the Board will continue to apply its traditional waiver analysis to determine whether some combination of contractual language, bargaining history, and past practice establishes that the union waived its right to bargain regarding a challenged unilateral change.

MV Transportation, supra slip op. at 12.

Thus, the Board's traditional "clear and unmistakable" waiver standard remains applicable where the contract coverage defense fails. Under that standard, a waiver of statutory bargaining rights is not lightly inferred and must be "clear and unmistakable." See *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983); *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). The party asserting waiver must establish that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB at 811; *Johnson-Bateman Co.*, 295 NLRB 180, 189 (1989) (In order to find a waiver based on contractual language, that language must be "sufficiently specific"). Moreover, in order to rely on bargaining history for a waiver, the evidence must show that the specific issue was "fully discussed and consciously explored during negotiations" and that "the union . . . consciously yielded or clearly and unmistakably waived its interest in the matter." *Johnson-Bateman*, supra at 185. As the Board explained in *Provena*, supra at 813:

> The waiver standard . . . effectively requires the parties to focus on particular subjects over which the employer seeks the right to act unilaterally. Such a narrow focus has two clear benefits. First, it encourages the parties to bargain only over subjects of importance at the time and to leave other subjects to future bargaining. Second, if a waiver is won—in clear and unmistakable language—the employer's right to take future unilateral

[19] Contrary to the Respondent's suggestion on brief, there is zero evidence that subcontracting of the ERT constituted an emergency—indeed, one puzzles over how a subcontracting decision conceived of in March and April, announced in June, and implemented in September, could be characterized as an emergency. As referenced above, its claim that safety motivated the subcontract is belied by the complete absence of contemporaneous reference to that motivation at the time of the planning, announcement, or implementation of the subcontracting.

action should be apparent to all concerned.

As referenced above, the labor agreements offer nothing that aids DuPont in meeting the clear and unequivocal waiver standard. Nothing shows a mutual intention to permit unilateral employer action with respect to subcontracting of the ERT program. Moreover, the bargaining history demonstrates the opposite of a bargaining waiver. The bargaining history shows that time and time again, going back over a decade, the parties bargained over and agreed to changes that DuPont (or the Union) wanted to make regarding the ERT program. There is no waiver on this record.[20]

In sum, for all of these reasons, the Respondent violated Section 8(a)(5) of the Act by failing and refusing, since on or about June 19, 2018, to bargain over the decision to subcontract the emergency services work performed by unit employees at the Spruance plant.[21]

3. Effects bargaining

As referenced above, the complaint generally alleges (GC Exh. 1(c) at ¶¶ 6 &10) that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain over the emergency services work. As discussed above, as I have found, the Respondent unlawfully refused to bargain over the decision to subcontract the emergency services work. Apart from its duty to bargain over the decision to subcontract the emergency services, the duty to bargain includes the obligation to bargain over the effects of that decision. *First National Maintenance*, supra at 681.

The Respondent does not dispute that it had an obligation to bargain the effects of its decision. Rather, it contends that it repeatedly offered and tried to do so, but that the Union refused, thereby waiving the right to bargain effects.

The problem with the Respondent's argument is that its offer to bargain the effects was at all times made in the context of its unlawful refusal to bargain over the subcontracting decision. "Where, as here, a union is entitled to bargain over both the decision and its effects, the employer must provide the union a prior or contemporaneous opportunity to bargain over the former to fully satisfy its obligation to bargain over the latter." *International Game Technology*, 366 NLRB No. 170, slip op. at 1 fn. 3 & 10 (2018). See *Solutia, Inc.*, 357 NLRB 58, 65 (2011) ("Respondent's limited offer to bargain only over the latter [the effects] without the former [the decision] was insufficient to satisfy its obligations as to either") and cases cited therein; enfd. 699 F.3d 50 (1st Cir. 2012); *Dan Dee West Virginia Corp.*, 180 NLRB 534, 539 (1970) ("It may be true that the Union avoided bargaining about the effects of the change, but bargaining on that subject was premature until the matter of the change was resolved or an impasse reached on it.")

The duty to bargain over the emergency services included the duty to bargain over the decision and the effects of the decision to subcontract. Given the Respondent's unlawful failure to bargain over the subcontracting decision, the Respondent failed to satisfy its duty to bargain over the effects of that decision.

B. The Unilateral Implementation of The Emergency Services Subcontracting

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by, about September 1, 2018, unilaterally subcontracting emergency services work performed by unit employees. (GC Exh. 1 at ¶7.)

In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court held that a unionized employer's unilateral change in employment terms without providing the union notice and an opportunity to bargain is a violation of Section 8(a)(5).

Although sharing the same premise—in that the unilateral change must be regarding a mandatory subject of bargaining—this duty to refrain from unilateral action is "[s]eparate from the duty to bargain upon request." *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 4 (2017).

Here, for the reasons described above, DuPont had a duty to provide notice and an opportunity to bargain over the decision to subcontract the emergency services. It refused to bargain, and, therefore, the September 1, 2018 unilateral implementation of the subcontracting was a violation of Section 8(a)(5) and, derivatively, 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent DuPont Specialty Products USA, LLC, as a successor to E.I. du Pont de Nemours and Company (DuPont) is an employer engaged in commerce within the meaning of Section 2(2), and (6), of the Act.

2. The Charging Party Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of DuPont Workers (Union or

[20] DuPont suggests (R. Br. at 20 & 31) that a waiver of the right to bargain the subcontracting of emergency services can be found in the Union's July 2017 failure to request bargaining when informed of DuPont's intention to sell the Spruance plant's utilities operations to Veolia. The singular sale of these operations—for which, by the way, DuPont continued to provide emergency services—was far too dissimilar to provide a basis for a clear and unmistakable waiver of the duty to bargain over the subcontracting of ERT. *Owens-Corning Fiberglas*, 282 NLRB 609, 613 (1987) (no waiver because "the historical changes were not the same as this one"); *Provena*, 350 NLRB at 815 & fn. 35. Even more unusual is the claim (R. Br. at 31) that the Union waived the right to bargain over the subcontracting by not raising the issue in negotiations for the 2018 Agreement. Putting aside that, in fact, Addendum E to the 2018 Agreement appears to restrict unilateral contracting out, the negotiations for the 2018 Agreement occurred at the very time that DuPont was refusing to bargain over the subcontracting decision. DuPont cannot rely on its affirmative (and unlawful) refusal to bargain to establish a simultaneous waiver by the Union.

[21] The complaint alleges a violation of the Act since June 18, 2018. However, as set forth above, the June 18 meeting between DuPont and the union presidents was brief and the record does not show a refusal to bargain. Rather, when he heard about the subcontracting decision, ARWI President Palmore told Holmes that he wanted DuPont to meet with the ARWI executive committee. The record shows Palmore asked at the meeting if DuPont was "going to bargain it" but the record does not show what the answer was. DuPont promptly scheduled a meeting the next day, June 19, with the ARWI executive committee, and at that meeting made it clear that DuPont was refusing to bargain over the subcontracting decision. Accordingly, I find a violation beginning June 19, 2018. I also note that a violation of Sec. 8(a)(5) is a derivative violation of Sec. 8(a)(1). *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956). See, *ABF Freight System*, 325 NLRB 546 fn. 3 (1998). Hence, I will find a Sec. 8(a)(1) violation, as alleged.

ARWI) is a labor organization within the meaning of Section 2(5) of the Act.

3. The ARWI is the designated collective-bargaining representative of the following appropriate bargaining unit of the Respondent's employees at the Spruance plant, Richmond, Virginia:

> All production, maintenance, service and Plant technical hourly wage roll employees at the Plant included within the unit appropriate for collective bargaining purposes certified in an order of the National Labor Relations Board in Case Nos. 5–R–2724, 5–R–2773, 5–R–2791 bearing date of January 31, 1947, but excluding all employees classified as instructors, instructresses, security officers, United Service Employees, employees when working as relief supervisors and supervisors-in-training, and all supervisory employees set forth ln said cases with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

4. The Respondent violated Section 8(a)(5) and (1) of the Act, since on or about June 19, 2018, by failing and refusing to bargain collectively with the Union over the decision to subcontract the Spruance plant emergency services work, and over the effects of that decision.

5. The Respondent violated Section 8(a)(5) and (1) of the Act, since on or about September 1, 2018, by subcontracting the Spruance plant emergency services work without affording the Union an opportunity to bargain with respect to this conduct.

6. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall, upon request, bargain with the Union over the decision to subcontract the Spruance plant emergency services work and over the effects of that decision.

The Respondent shall, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

The Respondent shall restore the status quo ante by transferring the work the Respondent subcontracted back to unit employees. "It is well settled that restoration of the status quo is the appropriate remedy for decision violations, absent a showing that it would be unduly burdensome." *Rigid Pak Corp.*, 366 NLRB No. 137, slip op. at 5 (2018) (see also cases cited therein). At the compliance stage of the proceeding, the Respondent will be permitted to argue and present supporting evidence that restoring the status quo ante would be unduly burdensome. *San Luis Trucking, Inc.*, 352 NLRB 211, 211 fn. 5 (2008); *Allied General Services*, 329 NLRB 568, 569 (1999); *Lear Siegler, Inc.*, 295 NLRB 857, 861–862 (1989).[22]

The Respondent shall make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful subcontracting, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizon*, 283 NLRB 1173 (1987) and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate the employees for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey*, *Inc*., 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 5 a report allocating backpay to the appropriate calendar year for each of the affected employees. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 19, 2018. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 5 of the Board what action it will take with respect to this decision

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

DuPont Specialty Products USA, LLC, as a successor to E. I. du Pont de Nemours and Company, Richmond, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with the

[22] No showing of undue burden was made at the unfair labor practice hearing. There was some suggestion at the hearing (Tr. 363) and on brief (R. Br. at 16) that a return to the status quo ante would require DuPont to undo its January 2019 agreement to continue to provide Veolia, its Spruance plant utilities operator, with emergency services. But this does not follow. DuPont's agreement with Veolia (R. Exh. 53) requires DuPont—not FDM or another contractor—to provide services to the utilities operation. These emergency services were provided by DuPont employees before the subcontracting and can be resumed as part of the return to the status quo.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of DuPont Workers (Union or ARWI) over the decision to subcontract the Spruance plant emergency services work and over the effects of that decision.

(b) Subcontracting the Spruance plant emergency services work without first notifying the Union and giving it an opportunity to bargain over the subcontracting decision and over the effects of that decision.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union over the decision to subcontract the Spruance plant emergency services work and the effects of that decision, for the following appropriate unit:

> All production, maintenance, service and Plant technical hourly wage roll employees at the Plant included within the unit appropriate for collective bargaining purposes certified in an order of the National Labor Relations Board in cases Nos. 5–R–2724, 5–R–2773, 5–R–2791 bearing date of January 31, 1947, but excluding all employees classified as instructors, instructresses, security officers, United Service Employees, employees when working as relief supervisors and supervisors-in-training, and all supervisory employees set forth ln said cases with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the unit described above.

(c) Restore the status quo ante by transferring the emergency services work the Respondent subcontracted back to unit employees.[24]

(d) Make the unit employees whole for any loss of earnings and other benefits suffered as a result of the subcontracting of the emergency services work, in the manner described in the remedy section of this decision.

(e) Compensate unit employees affected by the subcontracting of the emergency services work for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file with the Regional Director for Region 5, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its headquarters at the Spruance plant copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 19, 2018.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 11, 2019

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively with the Union, the Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of DuPont Workers, over our decision to subcontract the Spruance plant emergency services work or over the effects of that decision.

WE WILL NOT subcontract the Spruance plant emergency services work without first notifying the Union and giving it an

[24] At the compliance stage of the proceeding, the Respondent will be permitted to argue and present supporting evidence that restoring the status quo ante would be unduly burdensome. *San Luis Trucking, Inc.*, 352 NLRB 211, 211 fn. 5 (2008); *Allied General Services*, 329 NLRB 568, 569 (1999); *Lear Siegler, Inc.*, 295 NLRB 857, 861–862 (1989).

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

opportunity to bargain over the decision and over the effects of that decision.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, upon request, bargain with the Union over the decision to subcontract the Spruance plant emergency services work and the effects of that decision, for the following unit:

> All production, maintenance, service and Plant technical hourly wage roll employees at the Plant included within the unit appropriate for collective bargaining purposes certified in an order of the National Labor Relations Board in cases Nos. 5–R–2724, 5–R–2773, 5–R–2791 bearing date of January 31, 1947, but excluding all employees classified as instructors, instructresses, security officers, United Service Employees, employees when working as relief supervisors and supervisors-in-training, and all supervisory employees set forth ln said cases with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

WE WILL before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the unit described above.

WE WILL restore the status quo ante by transferring the emergency services work that we subcontracted back to unit employees.

WE WILL make unit employees whole for any loss of earnings and other benefits suffered as a result of the subcontracting of the emergency services work.

WE WILL compensate unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

DUPONT SPECIALTY PRODUCTS USA, LLC, AS A SUCCESSOR TO E.I. DU PONT DE NEMOURS AND COMPANY

Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-222622 by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.